

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

MONSANTO COMPANY and
MONSANTO TECHNOLOGY LLC,

Plaintiffs,

v.

E.I. DU PONT DE NEMOURS AND CO. and
PIONEER HI-BRED INTERNATIONAL, INC.,

Defendants.

Case No. 09-cv-0686 (ERW)

EXHIBIT B

**August 23, 2010 Transcript from Telephonic Motion Hearing
Pages 15, Line 14 through Page 17, Line 3**

**REPLY MEMORANDUM OF LAW IN SUPPORT OF DUPONT'S MOTION TO
BIFURCATE AND STAY DISCOVERY WITH RESPECT TO
WILLFUL INFRINGEMENT PURSUANT TO FED. R. CIV. P. 42(b)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MONSANT COMPANY, et al.,)
)
 Plaintiffs,)
)
 vs.) No. 4:09-CV-00686 (ERW)
)
 E.I. DUPONT DE NEMOURS & COMPANY,)
 et al.,)
)
 Defendants.)

TELEPHONIC MOTION HEARING
BEFORE THE HONORABLE E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

AUGUST 23, 2010

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1 whether there was discussion of the reason for the dates. The
2 fact is that the parties agreed to a disclosure of opinions
3 prior to Markman, and -- and we have our reasons for thinking
4 that's appropriate, and it was agreed to by the parties.

5 Now they're attempting to change those, that -- that
6 sequence, that order of proceeding, and we were -- they
7 asserted that it has no relevance. We think it does have
8 relevance. And so that was the genesis of my comments about
9 part of the relevance here is to avoid gamesmanship.

10 THE COURT: All right. All right. Well, let's leave
11 that where it is.

12 The -- Mr. Lombardi's recommendation seems sound to
13 me. Mr. Fleming, do you care to respond?

14 MR. FLEMING: Your Honor, I think that the general
15 framework is something that we're comfortable with, of course.
16 And further to that, what we would do, so the Court is not
17 held inordinately in limbo, as I mentioned, we intend to make
18 a Motion to Bifurcate. We intend to do so quickly so
19 Your Honor will have some additional briefing on the issue to
20 inform you about some of the underlying issues as well so that
21 you're not somehow denied the information about our arguments
22 about this while all of this is still going on.

23 So, Your Honor, if I might, just to recapitulate what
24 we're -- what we're -- what we're saying here is that the
25 hearings and all the pre-Markman proceedings will go forward

1 as before. Our time to decide whether to assert an opinion of
2 counsel is deferred, and -- and -- and Your Honor will
3 undertake to withhold its decision until such time as we then
4 make a decision as to disclosure. And if there are
5 disclosures, to afford the parties an opportunity to say
6 something briefly about the relevance or irrelevance about any
7 such disclosure.

8 THE COURT: That's as I understand it. I'll hear
9 again; we'll go around one more time just to make sure. And I
10 would like that somehow capsulated in a stipulation that is on
11 file so everyone is operating under the same assumption.

12 One thing that I would like to discuss a little bit
13 further today, since everyone is here, is my overriding
14 concern that enough time is given for the Markman hearing;
15 that all arguments are thoroughly made because those are very
16 helpful to me. And so this is really my concern that in
17 proposing one day, that I may have cut it too short. And I
18 want to make it clear that going in, while I do -- I am not
19 necessarily inviting anyone from covering the same ground
20 several times just to extend the time, if there is a realistic
21 view among counsel that more time is necessary, then I would
22 like somehow to build it in in terms of -- well, before we --
23 before we -- before we launch out on the date set.

24 Let me hear -- Mr. Lombardi, are you in accord with
25 what Mr. Fleming just reported?

1 MR. LOMBARDI: Yeah. Your Honor, I believe, if I
2 heard Mr. Fleming correctly, that that's essentially what --
3 what I had proposed. And so that would be acceptable to us.

4 THE COURT: That's -- That's my understanding, also.

5 MR. FLEMING: And, Your Honor, we thank Monsanto for
6 that -- that offer of compromise.

7 THE COURT: All right, good.

8 MR. FLEMING: And we'll memorialize it in a written
9 stipulation to submit to the Court.

10 THE COURT: Thank you. What about -- What's just
11 your general view about the time that's allowed? Is one day
12 really enough to cover all this material?

13 MR. FLEMING: Your Honor, I'm going to -- Ms. Ben-Ami
14 is here. She's going to address that issue with you.

15 THE COURT: All right.

16 MS. BEN-AMI: Thank you, Your Honor. I think a full
17 day could do it. I think a full day is a pretty long day, and
18 this is somewhat dense material.

19 THE COURT: Right.

20 MS. BEN-AMI: And if you had a second day that was
21 close in time or part -- not a full second day; maybe part of
22 a second day, that might help because, quite frankly, everyone
23 gets tired; some of us around 3:00 or 4:00 in the afternoon.
24 And there -- You know, it's most important that, you know, we
25 make ourselves clear to Your Honor.